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No. 89-1920

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD R. REWALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred by disqualifying petitioner's counsel because of a conflict of interest.

2. Whether one of petitioner's attorneys had a conflict of interest that prevented him from representing petitioner.

3. Whether one of the prosecutors should have been disqualified because he previously was employed by the CIA.

4. Whether petitioner received effective assistance of counsel.

5. Whether the district court abused its discretion by excluding from evidence certain classified information showing that petitioner engaged in intelligence-related activities.

6. Whether the district court erred by failing to order the government to produce FBI summaries of interviews of all the government witnesses under the Jencks Act, 18 U.S.C. 3500.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 13403-13475) is reported at 889 F.2d 836, as amended, 902 F.2d 18.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1989. The petition for a writ of certiorari was filed on June 7, 1990, and therefore is substantially out of time under Rule 13 of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] A petition for rehearing was filed, out of time, on January 22, 1990, along with a motion to permit the untimely filing. See Pet. 2. That motion had not been acted upon as of the filing of this brief.

STATEMENT

Following a jury trial in the United States District Court for the District of Hawaii, petitioner was convicted on 37 counts of mail fraud, in violation of 18 U.S.C. 1341; 38 counts of offering securities for sale under fraudulent pretenses, in violation of 15 U.S.C. 77(q)(a) and 77(x); three counts of knowingly transporting stolen securities in interstate commerce, in violation of 18 U.S.C. 2314; one count of causing an investment advisor to defraud its clients, in violation of 15 U.S.C. 80b-6 and 80b-17; one count of failure to maintain records required by the Securities and Exchange Commission, in violation of 15 U.S.C. 80b-4 and 80b-17; four counts of making a material misrepresentation on a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001; two counts of falsely representing that investment accounts were insured by the federal government, in violation of 18 U.S.C. 709; four counts of perjury, in violation of 18 U.S.C. 1621; three counts of income tax evasion, in violation of 26 U.S.C. 7201; and one count of making a false statement in requesting an extension of time within which to file a tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to an aggregate term of 80 years' imprisonment and was fined $352,000. The court of appeals affirmed in part and remanded in part. Pet. App. 13403-13475.

1. The evidence at trial showed that in 1978, petitioner founded the investment firm of Bishop, Baldwin, Rewald, Dillingham, and Wong (Bishop, Baldwin), in Honolulu, Hawaii. Between 1978 and 1983, petitioner used the firm to defraud investors of approximately $17 million. To lure investors to the firm, petitioner made numerous misrepresentations regarding Bishop, Baldwin's history, its clients, its investment strategy, and its assets. After obtaining investors' money, petitioner sent out numerous false performance statements and other mailings designed to con-

vince investors that they were receiving a high return on their money. Petitioner also induced investors to leave their funds in Bishop, Baldwin accounts by telling them that their earnings were tax free until withdrawn. Petitioner used some of the money the firm received to pay returns to earlier investors, but he spent much of the money to operate Bishop, Baldwin and on personal expenses. Pet. App. 13410-13411.

During the period that Bishop, Baldwin operated, petitioner also had a relationship with the CIA. In 1978, petitioner volunteered his services to the Honolulu office of the CIA's Domestic Collection Division (DCD), which meets with American citizens who voluntarily provide to the CIA information they have learned as a result of their contact with foreign persons. Pet. App. 13412-13413. Over the next two years, petitioner had numerous contacts with the Honolulu DCD Chief, Jack Kindschi. Although many of their meetings were social, petitioner also recounted to Kindschi information he obtained during his foreign travels. *Id.* at 13414-13415.

In October 1978, CIA headquarters asked the Honolulu DCD to obtain light cover, known in the intelligence community as "backstopping," for two CIA "covert agents" in East Asia. Pet. App. 13415-13416. Kindschi asked petitioner to set up a company for that purpose. Petitioner complied with the request, establishing a company in name only and providing telex and telephone lines listed to the fictitious company to serve as the cover for the agents. *Ibid.* By mid-1982, the CIA terminated the backstopping arrangements. *Id.* at 13423-13424. In 1979, petitioner agreed to provide cover for another CIA employee by stating that the employee worked for a subsidiary of Bishop, Baldwin. *Id.* at 13416-13420.

2. a. Petitioner's defense at trial was that, in addition to requesting cover services, the CIA directed him to create

Bishop, Baldwin and to operate it for the CIA's benefit. He claimed that he spent the money invested in Bishop, Baldwin on developing intelligence contacts at the CIA's behest and that the CIA had agreed to repay him for those expenses. Pet. App. 13411.

To develop this defense, petitioner made pretrial discovery requests for classified information and documents. In response, the district court held several hearings pursuant to the Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 706. After those hearings, the district court ordered the government to provide documents bearing on 11 issues, including whether the CIA directed petitioner to set up Bishop, Baldwin and to make representations regarding its history, assets, and insurance; whether the CIA directed petitioner to maintain an extravagant lifestyle in order to foster relations with wealthy individuals from other countries for intelligence purposes; whether the CIA paid petitioner any money as a result of CIA activities; whether the CIA made representations to petitioner that it would cover any Bishop, Baldwin losses; whether any Bishop, Baldwin employees were CIA agents who managed or handled any of the functions or were involved in disbursing any Bishop, Baldwin funds; and whether the CIA told petitioner to make any specific investments. Pet. App. 13429-13431.

The government produced more than 400 CIA-related documents, either prior to or in response to the district court's order. It also responded to petitioner's 1717 interrogatories and provided 29 "substitutions" pursuant to Section 4 of CIPA, 18 U.S.C. App. at 706, which allows the government to provide a summary of classified material in lieu of the material itself. Petitioner objected to the government's response to his discovery requests and moved to compel further discovery. After a closed hearing, the district court denied petitioner's motion. In deny-

ing petitioner's motion for reconsideration, the court made it clear that petitioner was entitled to any materials showing that he undertook any of the actions charged in the indictment at the direction of the CIA. It held, however, that petitioner could not obtain discovery of information or documents that showed the covert activities of any CIA employee who was using Bishop, Baldwin as a cover if those activities did not involve the disposition of investors' funds. Pet. App. 13431-13432.

At trial, the court allowed petitioner to present evidence regarding his initial contacts with the CIA, his formation of companies to act as backstops for CIA employees, CIA reimbursement for the services he provided, his employment of and relationship with CIA officials, and the CIA's knowledge of Bishop, Baldwin's foreign offices. In addition, the court held that petitioner could introduce any evidence that showed that petitioner or Bishop, Baldwin had undertaken any activity at the direction of the CIA. Pet. App. 13433-13435. The court ruled, however, that evidence showing the details of any specific intelligence-related activities was inadmissible under Rules 401 and 403 of the Federal Rules of Evidence. *Id.* at 13435-13437.

b. After the indictment was returned, petitioner sought to have attorney A. Brent Carruth appointed as his counsel under the Criminal Justice Act, 18 U.S.C. 3006A. On October 15, 1984, a magistrate appointed Carruth to represent petitioner. At the time, Carruth was representing Richard Craig Smith, who had been charged with espionage in the Eastern District of Virginia. In preparing Smith's defense, Carruth contacted petitioner and sought to have him testify at Smith's trial. Like petitioner, Smith claimed to have undertaken the activities with which he was charged at the direction of the CIA. Smith asserted that the CIA agents with whom he dealt had given him Bishop, Baldwin's telephone number and told him that

Smith could leave messages for them at that number. Carruth sought petitioner's testimony to confirm that Bishop, Baldwin was a CIA company. Pet. App. 13447-13448.

The government moved to disqualify Carruth on the ground that he could not adequately represent both Smith and petitioner. Petitioner informed the court that he was willing to waive the conflict of interest, even though one of his other attorneys, the Federal Public Defender, told him that no competent defense counsel would allow him to testify at Smith's trial. The district court granted the government's motion and terminated Carruth's appointment. In July 1985, shortly before trial, petitioner informed the court that he had obtained funds to employ an attorney and that he wished to hire Carruth as his counsel. The district court denied this request as well. Petitioner was represented throughout the proceedings by the Federal Public Defender, one of his assistants, and a private attorney. Pet. App. 13447-13450.

The assistant Federal Public Defender representing petitioner was Brian Tamanaha. Shortly before trial, Tamanaha mentioned to prosecutors that he had received a telephone call from a Department of Justice attorney regarding employment with the Department. At the suggestion of one of the prosecutors, Tamanaha brought that telephone call to the attention of the district court. Gov't C.A. Br. 54. The district court then held an evidentiary hearing, at which Tamanaha explained that he had sent a resume to the Department of Justice some time earlier but was then hired by the Federal Public Defender in Hawaii. Tamanaha subsequently received an unexpected call from an attorney with the Department of Justice. During the brief telephone call, Tamanaha did not discuss petitioner's case or express an interest in working for the Department. He also informed the court that he had no interest in working for the Department of Justice in the future and

that he intended to continue to represent petitioner zealously. At the conclusion of the hearing, the district court found that Tamanaha had "severed all application with the Justice Department even though the resume continued to sit in the personnel office." Gov't C.A. Br. 55. The court noted that Tamanaha had provided professional and competent representation to petitioner and held that no conflict of interest existed. *Ibid.*

c. One of the prosecutors at trial was John Peyton, who, prior to relocating to Hawaii to serve as an Assistant United States Attorney, worked in a U.S. Attorney's Office in Florida and, before that, was chief of litigation for the CIA. Petitioner moved to disqualify Peyton on the ground that his representation of the government in this prosecution created an appearance of impropriety. The district court denied petitioner's motion. Pet. App. 13454-13455.

d. At trial, the government presented the testimony of Sunlin and Jason Wong, two of petitioner's associates. Both witnesses testified that during pretrial interviews, FBI agents took notes of what they said. Both also stated that they had never seen the agents' notes or the FBI-302 reports prepared on the basis of the interviews. Petitioner requested production of the FBI 302 reports of the interviews with Sunlin and Jason Wong on the ground that they might constitute substantially verbatim transcripts of the interviews within the meaning of the Jencks Act, 18 U.S.C. 3500(e)(2). The district court denied petitioner's request without reviewing the reports themselves, on the ground that neither Sunlin nor Jason Wong had signed, approved, or otherwise adopted the reports. Pet. App. 13468-13472.

3. In a lengthy and comprehensive opinion, the court of appeals rejected all of petitioner's challenges to his conviction except one, on which it remanded to the district court for further proceedings. Pet. App. 13403-13475.

a. The court of appeals first rejected petitioner's contention that the district court erred in refusing to admit evidence of his own intelligence-gathering activities and those of CIA employees associated with Bishop, Baldwin. Pet. App. 13440-13446. The court stated that it had examined every classified document that petitioner had brought to its attention and concluded that the district court had correctly excluded the evidence at issue under Fed. R. Evid. 403. In particular, the court found that documents relating to the intelligence activities of persons other than petitioner were only "minimally probative" of petitioner's claim that the CIA had directed him to spend investor money extravagantly. Therefore, the court concluded that the district court had not abused its discretion in concluding that the danger that the evidence in question would confuse the issues and mislead the jury substantially outweighed its "slight probative value." Pet. App. 13440.

Similarly, although the court of appeals found that "[t]he specific details of [petitioner's] meetings with foreign businessmen and government officials lend some credence to his contention that he was a bona fide CIA agent," it sustained the district court's exclusion of that evidence as well. The court of appeals explained that the evidence was "twice removed from [petitioner's] defense that he lacked the specific intent to defraud the investors," and that the court's independent review of the relevant documents supported the district court's assessment that details of petitioner's specific intelligence activities and those of his associates "did not prove that the CIA had *instructed* petitioner to spend Bishop Baldwin investor money to cultivate foreign intelligence contacts." Pet. App. 13441.

The court of appeals also noted that admission of evidence of petitioner's specific foreign intelligence-gathering activities might have "considerably delayed" an already

lengthy trial and "posed the substantial risk of permitting the trial to degenerate into an unfocused presentation of facts and testimony that would confuse the issues and mislead the jury." Pet. App. 13442. Moreover, the court pointed out that petitioner was permitted to introduce any evidence tending to prove that the CIA was aware of the expenditure of investor funds for CIA purposes. The court noted that the government's own witnesses testified that the CIA had informed petitioner of its intelligence needs, that petitioner had reported to the CIA about his meetings and observations in foreign countries, and that the witnesses had frequent contacts with petitioner and high regard for his usefulness and character. In these circumstances, the court of appeals held that the district court did not abuse its discretion in excluding evidence regarding the specific covert intelligence activities of petitioner and other Bishop, Baldwin employees. *Ibid.*

b. The court of appeals held that the district court's refusal to allow attorney Carruth to represent petitioner at trial did not violate petitioner's Sixth Amendment right to counsel. Pet. App. 13446-13452. The court first held that petitioner had no Sixth Amendment right to have Carruth appointed under the Criminal Justice Act to represent him, since indigent defendants have no Sixth Amendment right to choose their counsel. *Id.* at 13448 (quoting *Caplin & Drysdale, Chartered* v. *United States*, 109 S. Ct. 2646, 2652 (1989)). The court further concluded that the district court's refusal to allow petitioner to retain Carruth on the eve of trial did not abridge his right to counsel. The court of appeals agreed with the district court that Carruth's joint representation of petitioner and Smith raised a potential conflict of interest that the district court was obligated to prevent. Pet. App. 13450-13452.

c. The court of appeals also upheld the district court's decision not to disqualify prosecutor Peyton, observing

that his prior employment by the CIA was not troubling. Pet. App. 13454-13455. The court observed that petitioner had failed to identify any evidence controverting the government's explanation that Peyton came to Hawaii at the time of Bishop, Baldwin's collapse "quite by chance," that petitioner's contrary assertion that Peyton came to help cover up embarrassing secret information was "based upon unfounded gossip and speculation," *id.* at 13455, and that the record contained no evidence of prosecutorial misconduct. *Id.* at 13456-13460.

d. The court of appeals declined to address petitioner's claim that he had received ineffective assistance from his court-appointed counsel. Instead, following the "customary procedure" in the Ninth Circuit, the court held that petitioner should first present that claim to the district court, in a petition under 28 U.S.C. 2255, so that the district court could develop a record on the issue. Pet. App. 13453-13454. Although the court noted that it had recognized an exception to this customary procedure where " 'the defendant's legal representation was so inadequate as obviously to deny him his sixth amendment right to counsel,' " it found "no basis" for application of that exception here. *Id.* at 13453 (quoting *United States* v. *Wagner*, 834 F.2d 1482 (9th Cir. 1987)). In particular, the court found that the district court's post-trial citation of petitioner's counsel for contempt and counsel's other "run-ins" with the district court did not give rise to a presumption of prejudice; it noted, for example, that Tamanaha had rendered a "superb performance" immediately after one such incident. Pet. App. 13454 n.20.

e. Finally, the court of appeals remanded the case for reconsideration of petitioner's claim that the government violated the Jencks Act, 18 U.S.C. 3500, by failing to produce the FBI 302 reports of its interviews with Sunlin and Jason Wong. The court held that the district court should

have considered whether the reports were substantially verbatim accounts of the Wongs' oral statements, and it directed the district court to address that issue and to determine whether any error in the failure to produce the reports was harmless. Pet. App. 13466-13473.[2]

ARGUMENT

1. Petitioner first argues (Pet. 6-8) that the district court violated his Sixth Amendment right to counsel when it terminated Carruth's appointment under the Criminal Justice Act and later refused to allow petitioner to retain Carruth on the eve of trial. The court of appeals correctly rejected this claim, and it does not warrant review.

At the outset, there is no merit to petitioner's claim that he was entitled to have Carruth appointed to represent him under the Criminal Justice Act. In *Wheat* v. *United States*, 486 U.S. 153, 159 (1988), the Court held that "a defendant may not insist on representation by an attorney he cannot afford." Thus, no Sixth Amendment violation occurs when an indigent defendant is denied counsel of his choice, so long as the defendant is adequately represented by an attorney appointed by the court. See *Caplin & Drysdale, Chartered* v. *United States*, 109 S. Ct. 2646, 2652 (1989). Accordingly, petitioner's Sixth Amendment

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[2] The court of appeals also rejected several other contentions raised by petitioner, including that he had a constitutional right to be present at the CIPA hearing; that the government knowingly introduced perjured testimony at trial; that the prosecutors made improper remarks to the jury; that the district court erred by failing to grant him a change of venue; and that the district court erred by failing to give a limiting instruction during Sunlin Wong's testimony. Pet. App. 13443-13446, 13456-13466. Petitioner does not renew those claims in this Court. The court of appeals noted that it could not consider several of petitioner's other claims due to his "failure to comply with appropriate procedures." *Id.* at 13475.

rights were not violated by the district court's termination of Carruth's appointment in November 1984.

Nor can petitioner establish a Sixth Amendment violation based on the district court's refusal to allow petitioner to retain Carruth shortly before trial.[3] As the Court made clear in *Wheat*, district courts have an independent obligation to ensure that federal criminal defendants are represented by counsel who are free of conficts of interest. *Wheat*, 486 U.S. at 160; cf. Fed. R. Crim. P. 44(c) (district court has obligation to inquire into joint representation). For that reason, a court that finds a conflict of interest need not accept the defendant's waiver of the conflict. See *Wheat* 486 U.S. at 162.

Furthermore, when a district court disqualifies counsel based on an actual or potential conflict of interest, its decision is accorded "substantial latitude." 486 U.S. at 163. In this case, when petitioner sought to retain Carruth, Carruth was representing Richard Craig Smith in an espionage prosecution in Virginia. Smith's defense rested in part on his assertion that two CIA agents had given him Bishop, Baldwin's telephone number and told him that he should call that number to leave messages for them. Smith sought petitioner's testimony to support that defense. Carruth therefore faced a conflict of interest in pursuing an aggressive defense for Smith and in advising petitioner whether he should testify at Smith's trial. Moreover, at the time the court was required to rule on the disqualification motion, there was a substantial possibility that petitioner's and Smith's trials would occur simultaneously. Under these circumstances, the district court did not abuse its "broad latitude" in refusing to allow Carruth to enter an appear-

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[3] Despite his assertion that he had the resources to retain Carruth, petitioner continued to be represented by appointed counsel at trial and on appeal. Pet. App. 13448 n.14.

ance as retained counsel two weeks before trial. See *Wheat*, 486 U.S. at 163.

2. Petitioner next contends (Pet. 8-10) that attorney Tamanaha had a conflict of interest that prevented him from performing competently in assisting the Public Defender to represent petitioner. This argument is premised on petitioner's assertion that Tamanaha had been hired by the "Organized Racketeering Section" of the Department of Justice and therefore could not zealously represent petitioner. The premise of this claim is incorrect. Tamanaha had neither received nor accepted an offer of employment from the Department of Justice, and he informed the district court when he received a telephone call from an attorney with the Department of Justice that he did not plan to work for the Department. On the basis of those representations, the district court found that no conflict of interest existed. Moreover, based on its observation at trial, the district court found that Tamanaha had provided petitioner with professional and competent representation. See, *e.g.*, Pet. App. 13454 n.20 (Tamanaha rendered "superb performance at trial"). The court of appeals correctly refused to disturb either of these findings, and petitioner presents nothing to warrant further review of this fact-specific issue.

3. Petitioner further claims (Pet. 10-11) that prosecutor John Peyton should have been disqualified because he previously had been employed by the CIA. This claim is without substance. As the court of appeals found, petitioner produced no evidence to rebut the government's explanation that Peyton's arrival in Hawaii at the time of petitioner's prosecution was coincidental. Pet. App. 13455. Moreover, as the court of appeals recognized, *ibid.*, there is no basis for petitioner's apparent contention that Peyton's transfer from one government agency to another gives rise to a conflict of interest. Thus, the court

of appeals correctly declined to overturn petitioner's conviction based on Peyton's participation in the prosecution.[4]

4. Petitioner contends (Pet. 12-14) that he was deprived of the effective assistance of counsel. The court of appeals declined to consider this claim on direct appeal because the district court had not had an opportunity to develop a record on the issue. Instead, the court held that petitioner should raise this claim in a petition under 28 U.S.C. 2255. This approach accords with that of other courts of appeals, at least where the issue has not already been addressed by the district court in a motion for a new trial or otherwise, as in *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984). See *United States* v. *Costa*, 890 F.2d

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[4] Petitioner refers (Pet. 10) to two other "conflicts" in his trial. Both points were mentioned in passing in the "Statement" portion of his brief in the court of appeals, Appellant's C.A. Br. 17-18, but petitioner did not advance those points as independent grounds for reversing his conviction, see Appellant's C.A. Br. 1-5, 33-42, and the court of appeals therefore did not address them. In any event, neither claim has merit.

First, petitioner notes (Pet. 10) that the father of Benjamin Cassiday, an attorney in the Federal Public Defender's office, lost money that he had invested in Bishop, Baldwin. Based on this fact, petitioner argues that the Federal Public Defender had an actual conflict of interest. Except for one very early court appearance, however, Cassiday did not represent petitioner, and nothing in the record suggests that the Federal Public Defender's performance was affected by the circumstances of Cassiday's father. Moreover, petitioner waived any conflict resulting from that relationship. See Gov't C.A. Br. 14 n.10. Second, petitioner asserts (Pet. 10) that a cousin of the district judge was a victim of the fraud in the amount of $5000 (although he does not actually list this as a question presented for review (see Pet. i)). In the court of appeals, however, petitioner stated only that a cousin of the judge "allegedly" was a victim of the fraud. Appellant's C.A. Br. 18. Petitioner has not cited any evidence establishing that the "Mr. and Mrs. Fong" to whom he refers included a cousin of the judge.

480, 482-483 (1st Cir. 1989); *United States* v. *Cruz*, 785 F.2d 399, 404 (2d Cir. 1986); *United States* v. *Sandini*, 888 F.2d 300, 311-312 (3d Cir. 1989), cert. denied, 110 S. Ct. 1831 (1990); *United States* v. *Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987); *United States* v. *Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), cert. denied, 109 S. Ct. 2447 (1989); *United States* v. *Blackman*, 897 F.2d 309, 319 (8th Cir. 1990); *United States* v. *Arango*, 853 F.2d 818, 823 (11th Cir. 1988).[5] Because neither court below has passed on petitioner's claim, this Court also should decline to consider it at this time. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner has not established that the trial court's actions deprived him of the effective assistance of his attorneys. Petitioner particularly points to the district court's orders to show cause why counsel should not be cited for contempt and to several comments made during trial by the district judge. It was not until after the jury's verdict, however, that the district court ordered defense counsel to show cause why they should not be held in contempt for certain trial behavior. Gov't C.A. Br. 57. Thus, the show cause orders could not have affected counsel's performance during trial. Nor has petitioner shown that

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[5] In our brief in opposition to the certiorari petition in *Chappell* v. *United States*, No. 89-1040, we argued that claims of ineffective assistance of counsel should ordinarily be considered by the district court in the first instance under 28 U.S.C. 2255, rather than on direct appeal. In *Chappell*, the Seventh Circuit, in an unreported decision, had declined to consider the claim of ineffective assistance of trial counsel on a motion under 28 U.S.C. 2255 because the defendant had been represented on appeal by new counsel, who could have challenged the effectiveness of trial counsel. The Court granted the petition in *Chappell* and remanded the case to the Seventh Circuit for further consideration in light of our position that claims of ineffective assistance of counsel should ordinarily be raised under 28 U.S.C. 2255. 110 S. Ct. 1800 (1990). The rule we advocated in *Chappel* was followed in this case, so review is not warranted.

the district court's comments resulted in prejudice to petitioner during trial. Indeed, the court of appeals noted that the attorneys' representation seemed unaffected by their disputes with the court. See Pet. App. 13454 n.20. Absent a showing of specific prejudice, a trial court's conduct during trial does not deprive a defendant of the effective assistance of counsel. See *United States* v. *Morales*, 868 F.2d 1562, 1576 (11th Cir. 1989); *United States* v. *Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985); *United States* v. *Preston*, 608 F.2d 626, 636 (5th Cir. 1979), cert. denied, 446 U.S. 940 (1980).

5. Petitioner next contends (Pet. 14-21) that the district court's CIPA rulings deprived him of the ability to present evidence essential to his defense that he undertook his fraudulent activities at Bishop, Baldwin at the direction of the CIA. He maintains that the court erred in finding that evidence of his intelligence-related activities was inadmissible under Rule 403 because that evidence tended to show that he lacked the criminal intent to defraud Bishop, Baldwin investors. If the jury had known of his intelligence activities, he urges, it might have believed that he spent the Bishop, Baldwin investors' money for CIA purposes as well. This claim is without merit and does not warrant review.[6]

Both the district court and the court of appeals held that evidence of petitioner's intelligence activities was inadmissible under Fed. R. Evid. 403. Thus, both courts agreed

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[6] Petitioner also charges (Pet. 15) that his ability to develop this claim has been hampered by the government's removal of the classified materials bearing on his case from Terminal Island Federal Correctional Institution to CIA headquarters in Virginia. The court security officer has informed us that, in fact, the materials in question were moved from Terminal Island to a secure area in the federal district courthouse in Los Angeles, and not, as petitioner argues, to CIA headquarters.

that the danger that this evidence would unduly delay the trial, confuse the issues, and mislead the jury outweighed its minimal probative value in showing petitioner's lack of criminal intent. Neither court held that the classified or national security nature of the evidence was a factor in the determination whether the evidence should be admissible at trial. Compare *United States* v. *Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985) (en banc) (government has qualified privilege to refuse to disclose relevant classified information). In short, therefore, petitioner's challenge to the district court's rulings on this evidence simply seeks review of a fact-bound evidentiary determination under Fed. R. Evid. 403. District courts enjoy broad discretion in determining whether to exclude evidence after balancing its probative value against the risk of prejudice or confusion, see *Hamling* v. *United States*, 418 U.S. 87, 124-125 (1974); *United States* v. *Miller*, 874 F.2d 1255, 1275 (9th Cir. 1989); *United States* v. *O'Connell*, 841 F.2d 1408, 1423 (8th Cir. 1988), cert. denied, 109 S. Ct. 799 (1989); *United States* v. *Shorter*, 809 F.2d 54, 59 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987), and this Court ordinarily does not review such claims. Cf. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975) (Court does not review findings of fact concurred in by two courts below).

There is no occasion for review here, because the district court correctly held the evidence inadmissible. Petitioner was charged with defrauding Bishop, Baldwin investors by diverting the funds they invested to support his own extravagant lifestyle and for other purposes. His defense was that the CIA ordered him to set up and operate Bishop, Baldwin and to spend the funds invested to develop foreign intelligence contacts. The district court held that petitioner could introduce any evidence that showed that he had engaged in any of the activities charged in the indictment at the CIA's direction. Hence, the court did not

prevent petitioner from introducing any evidence that directly supported his defense. The court also admitted extensive evidence showing petitioner's relationship with the CIA.[7]

Against this background, the district court correctly determined that evidence of petitioner's specific intelligence-related activities would not have significantly advanced petitioner's defense. Although that evidence might have tended to show that petitioner performed intelligence work for the CIA, it did not show that the CIA directed petitioner to operate Bishop, Baldwin in a flagrantly fraudulent manner. Moreover, as the court of appeals held, the evidence of specific intelligence-related activities had a high potential for distracting the jury from the actual issues in the case. Accordingly, the district court did not abuse its discretion by excluding the evidence under Rule 403. The court of appeals' decision sustaining that ruling is consistent with the decisions of other courts of appeals in similar circumstances. See *United States* v. *Wilson*, 750 F.2d 7, 8-9 (2d Cir. 1984), cert. denied, 479 U.S. 839 (1986); *United States* v. *Wilson*, 721 F.2d 967, 975-976 (4th Cir. 1983); *United States* v. *Anderson*, 872 F.2d 1508, 1518-1519 (11th Cir. 1989), cert. denied, 110 S. Ct. 566 (1990); see also *United States* v. *Miller*, 874 F.2d at 1276-1277. Review therefore is not warranted.

6. Petitioner's final contention (Pet. 21-22) is that the district court failed to order the government to comply with the Jencks Act. Although the court of appeals re-

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[7] For that reason, this case is distinguishable from *United States* v. *Juan*, 776 F.2d 256 (11th Cir. 1985), on which petitioner relies (Pet. 19). In that case, as here, the defendant sought to show that his prior relationship with the United States negated his intent to violate the law. In contrast to this case, however, the defendant in *Juan* was prevented from introducing any evidence showing his past relationship with the government.

manded so that the district court could consider petitioner's Jencks Act claims with regard to two witnesses, petitioner claims in this Court that he was denied Jencks Act material "for all of the government witnesses." In his brief in the court of appeals, however, petitioner claimed only that he was denied the FBI 302 reports for Sunlin and Jason Wong. See Appellant's C.A. Br. 79-81.[8] And in this Court he has not identified any other witness for whom he has a basis to claim that he was denied Jencks Act material. Accordingly, this Court need not consider petitioner's Jencks Act claim.

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[8] In April 1990, petitioner filed a letter with the court of appeals stating that the district court had made a Jencks Act ruling applicable to all witnesses. On July 9, 1990, the court of appeals entered an order directing the parties to file a letter explaining the status of the case, with particular reference to the matter raised in petitioner's letter. The government response, by letter dated July 24, 1990, stated that it did not believe that the district court had made such a ruling. The court of appeals has not taken any action on petitioner's April 1990 letter. Petitioner's post-decision filing in the court of appeals of course does not cure his procedural default in failing to raise in his appellate brief a Jencks Act argument with respect to the 302 reports of any witnesses other than the Wongs. In any event, these matters may be resolved in the further proceedings in the district court and court of appeals. We have been informed that the district court has not yet ruled on the Jencks Act issue on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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